No. 17-72877

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHERN CALIFORNIA SMALL
BUSINESS ASSISTANTS, INC.,
Petitioner-Appellant,

vs.

COMMISSIONER of INTERNAL REVENUE,
Respondent-Appellee.

On Appeal from the United States Tax Court
Docket No. 10594-15 (Cary Douglas Pugh, J.)

AMICUS BRIEF IN SUPPORT OF THE APPELLANT'S REHEARING PETITION BY THE FEDERAL TAX CLINIC AT THE LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL

Professor T. Keith Fogg
Counsel for Amicus
Director, Federal Tax Clinic of the
Legal Services Center of
Harvard Law School
122 Boylston Street
Jamaica Plain, Massachusetts 02130
(617) 390-2532
kfogg@law.harvard.edu

Carlton M. Smith, Esq.
Counsel for Amicus
255 W. 23rd Street, Apt. 4AW
New York, New York 10011
(646) 230-1776
carltonsmth@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

INTEREST OF THE *AMICUS*[1]

The Federal Tax Clinic of the Legal Services Center of Harvard Law School ("the Clinic") was formed in 2015 to represent low-income taxpayers before the Internal Revenue Service and in tax matters before the courts. With some frequency, potential clients of the Clinic have come to the Clinic having allegedly filed a Tax Court petition late, like the appellant in this case. Since this is a continuing problem for low-income *pro se* taxpayers, both as counsel for such taxpayers in the courts of appeals and as *amicus*, the Clinic has recently argued that the deadlines in §§ 6015(e)(1)(A),[2] 6213(a), 6330(d)(1), and 7623(b)(4) for filing Tax Court innocent spouse, deficiency, Collection Due Process ("CDP"), and whistleblower award petitions, respectively, are not jurisdictional and are subject to equitable tolling or estoppel under recent Supreme Court case law that has narrowed the use of the word "jurisdictional" generally to exclude filing deadlines. Indeed, the Clinic filed an *amicus* brief earlier in this case.

The Clinic's purpose in filing this brief is to request that this Court grant the petition for rehearing and hold that the deadline in § 6213(a) in

---

[1] The parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), this is to affirm that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.

[2] Unless otherwise indicated, all section references are to the Internal Revenue Code, Title 26.

which to file a Tax Court deficiency suit is not jurisdictional and is subject to equitable tolling. Such a nonjurisdictional ruling may be of aid to low-income taxpayers because, in that event, any noncompliance with the filing deadline would become an affirmative defense that the government could waive or would forfeit (if the government did not raise the argument early enough in the litigation). Other such taxpayers who, for equitable reasons, missed the filing deadline might also benefit.

ARGUMENT

I. The Panel Erred in Holding the Deficiency Petition Filing Deadline Jurisdictional Under Current Supreme Court Case Law.

There is a long history of the Tax Court's filing deadlines being held jurisdictional. Indeed, probably every Circuit has by now held that the filing deadline at § 6213(a) under the Tax Court's original, deficiency jurisdiction is jurisdictional. The Clinic agrees with the panel that many published opinions in the Ninth Circuit have held the deficiency petition filing deadline to be jurisdictional. However, the opinions of this Court cited by the panel (slip op. at 20) were either (1) decided in an era when courts felt that sovereign immunity could be waived only explicitly by statute and that filing deadlines, particularly those in courts of limited jurisdiction, must be complied with in order for the court to have jurisdiction or (2) decided

without discussing developments in Supreme Court non-tax opinions that clearly have changed the rules of what is jurisdictional.

Beginning in 2004, in *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Supreme Court clarified that, at least henceforth, filing deadlines should almost never be treated as jurisdictional. In *Henderson v. Shinseki*, 562 U.S. 428 (2011), the Supreme Court explained why it is generally a poor outcome – both for the courts and for plaintiffs – if a filing deadline is jurisdictional:

> Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system. Under that system, Courts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.
>
> Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times. Objections to subject-matter jurisdiction, however, may be raised at any time. Thus, a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction. Indeed, a party may raise such an objection even if the party had previously acknowledged the trial court's jurisdiction. And if the trial court lacked jurisdiction, many months of work on the part of the attorneys and the court may be wasted.

Id. at 434-435 (citations omitted). In *Henderson*, the Supreme Court held that the filing deadline for another Article I court, the Court of Appeals for Veterans Claims, is not jurisdictional.

In the fiscal year ended September 30, 2019, taxpayers filed 24,658 Tax Court petitions. IRS Data Book, 2019 at 68 (Table 29). These petitions were under about 20 different jurisdictions of the Tax Court. But three jurisdictions of the Tax Court comprise the vast bulk of its petitions: deficiency, CDP, and innocent spouse, and it has long been the case that deficiency petitions make up around 90% of all petitions filed. Harold Dubroff & Brant Hellwig, "The United States Tax Court: An Historical Analysis" (2d Ed. 2014) at 909 (Appendix B). The Dubroff & Hellwig book is the semi-official history of the Tax Court, available at a link on the "history" page of the court's website. "Over 75 percent of the petitioners who file with the Court are self-represented (pro se)." U.S. Tax Court Congressional Budget Justification Fiscal Year 2021 (Feb. 10, 2020) at 22, also available at a link on that "history" page.

Professor Fogg and former Professor Smith, counsel for the Clinic, each have been practicing in the Tax Court for about 40 years. In their experience, about 10% of petitions filed therein are dismissed for lack of jurisdiction – most for the failure of the taxpayers to show that they received

one of the notices (such as a notice of deficiency) constituting a "ticket" to the court. In Profs. Fogg and Smith's experience, however, fewer than 1,000 deficiency petitions are dismissed each year for lack of jurisdiction because of late filing. And only a very small percentage of those fewer than 1,000 petitions would involve facts alleged by the taxpayer that could support equitable tolling of the filing deadline. Floodgates would not open if equitable tolling were allowed to excuse the late filing of probably a few handfuls of deficiency petitions each year.

As the panel deciding this case recognized, the Supreme Court has made clear its current position that statutory time deadlines in which to file in court are today only rarely jurisdictional. There are only two exceptions to this rule: a "clear statement" exception and a *stare decisis* exception. The panel relied on both exceptions in holding that the deficiency petition filing deadline is jurisdictional. However, neither of those exceptions should apply to make the § 6213(a) filing deadline jurisdictional.

The petition for rehearing argues that the panel erred applying both exceptions. The Clinic agrees.

This brief will not generally address the "clear statement" exception, as the rehearing petition adequately explains how the panel erred with respect thereto. The petition for rehearing argues that the holding of the

panel conflicts with *Volpicelli v. Commissioner*, 777 F.3d 1042 (9th Cir. 2015), in applying the clear statement exception. The Clinic agrees. The panel's application of the "clear statement" exception also is in conflict with this Court's holding in *Magnum v. Action Collection Services, Inc*., 575 F.3d 935 (9th Cir. 2009). In *Magnum*, this Court held that a time period was not jurisdictional, despite its being adjacent to a jurisdictional grant in the same sentence. 15 U.S.C. § 1692k authorizes a suit for monetary damages under the Fair Debt Collection Practices Act. Subsection (d) thereof provides: "Jurisdiction: An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs." This Court stated:

> [W]e attach no particular significance to the fact that this statute of limitations appears in the same sentence in which the jurisdiction provision appears. Nothing in the structure of that sentence tells us that the time limitation was also a jurisdictional limitation. In fact, a more natural reading is that parties may bring their action in any "court of competent jurisdiction" and may do so "within one year." 15 U.S.C. § 1692k(d). It is fair to say that parties are faced with a "when" issue and a "what court" issue for every action, but the former does not usually control or affect the latter.

Magnum, *supra*, at 940.

However, the rehearing petition, in the Clinic's view, did not emphasize enough that it was wrong of the panel to rely on opinions merely of circuit courts of appeal for the *stare decisis* exception to apply.

A. The *Stare Decisis* Exception to Current Supreme Court Rules Making Filing Deadlines Nonjurisdictional Does Not Apply to Rulings of Circuit Courts.

In its opinion (at page 25), the panel wrote, "[T]he historical treatment of the provision at issue further confirms that § 6213(a) imposes a jurisdictional time limit. As noted earlier, the circuits have uniformly adopted a jurisdictional reading of § 6213(a) or its predecessor since at least 1928." (cleaned up).

Since *Kontrick*, there have been only two Supreme Court opinions holding that a filing deadline is jurisdictional. However, those holdings were predicated not on the clear statement exception, but only on *stare decisis*, since for over 100 years, the Supreme Court had held those filing deadlines jurisdictional. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007).

As the taxpayer in this case points out in the rehearing petition, however, the Supreme Court has never ruled on the jurisdictional nature of the filing deadline in § 6213(a) or any other path into the Tax Court. Accordingly, this *stare decisis* exception cannot apply here. The taxpayer's

rehearing petition correctly quotes from Justice Ginsburg's recent unanimous opinion in *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1849 (2019), the very line the panel quoted with a *cf*. cite – "[T]he Court has stated it would treat a requirement as jurisdictional when a long line of Supreme Court decisions left undisturbed by Congress attached a jurisdictional label to the prescription." (cleaned up)). Of course, the panel had to use a *cf*. cite, since the *Davis* case provides no support for relying on precedent of circuit courts.

In considering whether rehearing should be granted herein, the Clinic points out that there are seven more Supreme Court opinions (none acknowledged by the panel or cited in the rehearing petition) that describe the *stare decisis* exception as only applying to a long line of Supreme Court opinions. Thus, the panel's reliance on this exception is actually in conflict with eight recent Supreme Court opinions. Here are pertinent quotes from the seven other opinions:

1) "[R]elying on a long line of *this Court's decisions* left undisturbed by Congress, we have reaffirmed the jurisdictional character of the time limitation for filing a notice of appeal stated in 28 U.S.C. § 2107(a)." *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen.*

Comm. of Adjustment, 558 U.S. 67, 82 (2009) (citing *John R. Sand* and *Bowles*; emphasis added).

2) "*Bowles* stands for the proposition that context, including *this Court's interpretation* of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (emphasis added).

3) "[C]ontext, including *this Court's interpretation* of similar provisions in many years past, is relevant." *Reed Elsevier, supra*, at 168. When "a long line of *this Court's decisions* left undisturbed by Congress," *Union Pacific*, *supra*, at 82, has treated a similar requirement as "jurisdictional," we will presume that Congress intended to follow that course.

Henderson v. Shinseki, 562 U.S. at 436 (citing *John R. Sand* and *Bowles*; emphasis added).

4) We have also held that "context, including *this Court's interpretation* of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010). Here, however, even though the requirement of a COA (or its predecessor, the certificate of probable cause (CPC)) dates back to 1908, Congress did not enact the indication requirement until 1996. There is thus no "long line of *this Court's decisions* left undisturbed by Congress" on which to rely. *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. Of Adjustment*, 558 U.S. 67, 82 (2009).

Gonzalez v. Thaler, 565 U.S. 134, 142 n. 3 (2012) (emphasis added).

5) "We consider 'context, including *this Court's interpretations* of similar provisions in many years past,' as probative of whether

Congress intended a particular provision to rank as jurisdictional. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010)". *Sebelius v. Auburn Regional Med. Center*, 568 U.S. 145, 153-154 (2012) (emphasis added).

6) "What is special about the Tucker Act's deadline, *John R. Sand* recognized, comes merely from *this Court's prior rulings*, not from Congress's choice of wording." *United States v. Wong*, 575 U.S. 402, 416 (2015) (emphasis added).

7) In determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including *this Court's interpretations* of similar provisions in many years past,' as probative of [Congress' intent]." [Sebelius v. Auburn Regional Med. Center, supra] at 153-154 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010).

Hamer v. Neighborhood Housing Servs., 138 S. Ct. 13, 20 n.9 (2017) (emphasis added).

Further, in her concurring opinion in *Reed Elsevier*, *supra* at 173-174, Justice Ginsburg (joined by two other Justices) explicitly rejected the idea of a *stare decisis* exception applicable to circuit court of appeal opinions: "[I]n *Bowles* and *John R. Sand & Gravel Co.* . . . we relied on longstanding decisions of *this Court* typing the relevant prescriptions 'jurisdictional.' *Amicus* cites well over 200 opinions that characterize § 411(a) as

jurisdictional, but not one is from this Court. . . .” (emphasis in original; citations omitted).

B. The Panel's Concern About § 7459(d) Potentially Harming Taxpayers is Vastly Outweighed by Benefits Other Taxpayers Would Get by the Deficiency Petition Filing Deadline Being Declared Nonjurisdictional.

In its opinion (at pp. 24-25), the panel cited the existence of § 7459(d) as supporting its holding that the deficiency petition filing deadline is jurisdictional because, if it were otherwise, § 7459(d) might require that the Tax Court, when dismissing a petition as late on nonjurisdictional grounds, had precluded a taxpayer from later paying the deficiency and suing for a refund. While that may be true (though no court has yet so held), the panel ignores three things:

First, timely filing is one of many current grounds treated as jurisdictional that the appellant identified in its reply brief, so the subsection exception for jurisdictional dismissals is not rendered superfluous if timely filing is not treated as one of those jurisdictional issue.

Second, the predecessor of § 7459(d) is Revenue Act of 1926, § 1000, which amended Revenue Act of 1924, § 906(c). That 1926 amendment contained no jurisdictional dismissal exception. The exception for jurisdictional dismissals was enacted by Congress only in Revenue Act of 1928, § 601, which revised the Revenue Act of 1924 § 906(c), as amended

in 1926. The legislative history of the 1928 amendment adding the jurisdictional exception does not explain the purpose of the exception; *see* H. Rept. 2, 70th Cong., 1st Sess.; S. Rept. 960, 70th Cong., 1st Sess.; H. Rept. (Conf.) 1882, 70th Cong., 1st Sess.; so it is pure speculation by the panel concerning what Congress intended concerning the ability of taxpayers who file late in the Tax Court to later, after dismissal, pay the deficiency and not be precluded from suing for a refund. The panel does not like the "peculiar outcome" that might flow from the taxpayer's argument that the petition filing deadline is not jurisdictional. But, that is a legislative issue, not one for the courts to decide.

Third, even though the panel has identified a potential problem, that problem is, realistically, not a real problem because in the experience of Profs. Fogg and Smith, taxpayers who are dismissed from the Tax Court for late filing a deficiency petition never thereafter pay the deficiency and then bring a suit for refund in another court. Taxpayers filed only 219 refund suits in the fiscal year ended September 30, 2019 in all courts. IRS Data Book, 2019 at 68 (Table 29). It is hard to believe that any of such suits were filed after a taxpayer filed a late Tax Court petition, had her suit dismissed, and then paid the deficiency in order to bring a refund suit. Neither professor ever recalls seeing an opinion describing such a situation (though

they concede that it might be possible that it has happened on very rare occasion).

In contrast to the panel's essentially theoretical concern for taxpayers as a result of § 7459(d), every month multiple taxpayers have their Tax Court cases dismissed only because the filing deadline is currently treated as jurisdictional and so the Tax Court judges, *sua sponte*, police late filing. IRS attorneys regularly fail to notice some potential late filings and so fail to move to dismiss for lack of jurisdiction. Tax Court judges, however, feel the need to examine whether deficiency petitions are late filed in all cases. When a judge suspects that a petition was filed late, the judge issues an order to show cause why the case should not be dismissed for lack of jurisdiction. In November and December 2019 (typical pre-COVID-19 months), the Tax Court issued orders to show cause to dismiss deficiency petitions for untimely filing four and eight times, respectively.[3] All 12 such taxpayers

[3] *See* orders in *Beaupre v. Commissioner*, Docket No. 23536-18S (dated Nov. 8, 2019); *Croker v. Commissioner*, Docket No. 9070-18S (dated Nov. 15, 2019); *Gonzalez v. Commissioner*, Docket No. 2256-19S (dated Nov. 15, 2019); *Chappell v. Commissioner*, Docket No. 20711-19 (dated Nov. 27, 2019); *Harris v. Commissioner*, Docket No. 15979-19S (dated Dec. 17, 2019); *Castaldo v. Commissioner*, Docket No. 19264-19 (dated Dec. 19, 2019); *Treas v. Commissioner*, Docket No. 12225-19S (dated Dec. 19, 2019); *Davila-Cabrera v. Commissioner*, Docket No. 19192-19 (dated Dec. 20, 2019); *Mansfield v. Commissioner*, Docket No. 19342-19S (dated Dec. 23, 2019); *Rosenthal v. Commissioner*, Docket No. 18392-19S (dated Dec. 26, 2019); *Stephens v. Commissioner*, Docket No. 20418-19 (dated Dec. 30,

lost their chance to have their deficiencies litigated in the Tax Court only because the judges treated the filing deadline as jurisdictional. Thus, the result sought by the taxpayer herein is much more pro taxpayer than the result reached by the panel.

C. The Panel's Concerns About Applying the Prohibitions on Assessment and Collection in Conjunction With Equitable Tolling Extensions Are Misconceived.

As further support for holding the deficiency petition filing deadline jurisdictional, the panel (at pp. 24-25) discusses the interaction of the Tax Court's limited additional jurisdiction (granted in 1988) to enforce the assessment and collection prohibitions in the statute that have existed since 1926. Before 1988, taxpayers could enforce such prohibitions only by brining injunctive suits in district courts. The panel concluded that if a deficiency petition were accepted by the Tax Court under equitable tolling, the Tax Court would lack power to enjoin any collection that had taken place after the 90 days to file expired because the petition would not have been "timely filed" (the words limiting the Tax Court's jurisdiction to prevent suits for injunction that are not ancillary to a suit for redetermination of the deficiency under the first sentence of § 6213(a)). Thus, the taxpayer would

---

2019); and *Slavo v. Commissioner*, Docket No. 19732-19 (dated Dec. 31, 2019).

have to bring a separate injunctive suit in district court – something the panel concludes would not be a "sensible" construction of the 1988 statute.

To prevent this outcome, there is no reason that a court holding a petition "timely" under equitable tolling could not also hold it "timely" for purposes of the sentence giving the Tax Court injunctive jurisdiction. There are existing statutory extensions of filing deadlines that no doubt would make a petition filed after the 90th day "timely". See §§ 7502, 7508, and 7508A. For example, under § 7508A, the IRS has power to provide extensions on account of Presidentially-declared disasters. 26 C.F.R. § 301.7508A-1(c)(1)(iv) allows the IRS to grant extensions for "[f]iling a petition with the Tax Court". 26 C.F.R. 301.7508A-1(c)(2) also allows the IRS to grant extensions of deadlines for actions performed by the IRS, including assessment and collection. Only recently, as a result of the COVID-19 pandemic, the IRS, in §§ III.C. and D., Notice 2020-13, 2020-18 I.R.B. 742, both extended the taxpayer's time to file a Tax Court petition and the IRS' time to take assessment and collection actions.

The panel thus creates a problem by holding petitions deemed "timely" by equitable tolling not similarly "timely" to those arising from statutory extensions. Then, the panel cites the problem it created for leading to an unwise policy outcome – required actions in two courts – the outcome

the Congress sought to minimize in the 1988 legislation. But, the statutes can be harmonized simply be a more natural reading of the word "timely" to incorporate petitions filed under both statutory and equitable extensions.

II. Equitable Tolling Would Be Highly Beneficial to Taxpayers in Many Other More Typical Cases.

Like many equitable tolling cases, this one presents a rare fact pattern. But, before denying equitable tolling to all taxpayers, the Court should consider that there are more common fact patterns where equitable tolling might be of benefit to taxpayers.

It is generally conceded that there are three common grounds for allowing equitable tolling of non-jurisdictional filing deadlines:

> There may be equitable tolling (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.

Mannella v. Commissioner, 631 F.3d 115, 125 (3d Cir. 2011) (cleaned up).

For a common fact pattern (which appears to occur about once each month), *see Rosenthal v. Commissioner*, Tax Court Docket No. 18392-19S (order to show cause dated Dec. 26, 2019). There, the taxpayers had erroneously mailed their petition to the IRS Laguna Nigel Office, and that office had, weeks later, forwarded it to the Tax

Court, where it arrived after the 90-day period had expired. The Clinic entered an appearance for the taxpayers in that case and found that the petition bore an IRS "received" stamp showing a date well before the expiration of the 90 days. The Clinic initially argued that the filing should be treated as timely under the equitable tolling ground of timely filing in the wrong forum, citing cases involving the Court of Appeals for Veterans Claims allowing equitable tolling under similar circumstances. *Bailey v. Principi*, 351 F.3d 1381, 1382 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002); *Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed. Cir. 2002). The Clinic later withdrew its argument when the IRS issued a replacement notice of deficiency so that the taxpayers could timely file a new petition. The Tax Court dismissed the initial petition for lack of jurisdiction as untimely. *See* order of dismissal dated Jun. 29, 2020.

Further, consider the issue of serious illness during the 90 days preventing timely filing. The COVID-19 extension that the IRS granted was only from April 1, 2020 until July 15, 2020. Notice 2020-23, § III.C. No further extension is anticipated, yet the pandemic has continued. What if the IRS mails a notice of deficiency to the taxpayer on August 1, 2020, which

the taxpayer receives on August 4, 2020. The taxpayer gets the notice, but is too sick with COVID-19 to prepare a Tax Court petition that day and instead goes to a hospital, where she is placed into a coma and intubated for 95 days. By the time the taxpayer awakes from the coma, the time to file a Tax Court petition will have expired. Clearly, this would have been a circumstance beyond the taxpayer's control that prevented timely filing. Absent this Court's holding that the Tax Court CDP petition filing deadline is not jurisdictional and is subject to equitable tolling, the taxpayer will have lost her pre-payment judicial contest rights.[4] Such a holding would only compound the pandemic's tragedies.

[4] Because she received the notice of deficiency, she has also lost her rights under CDP to contest the underlying tax, prepayment, in the Tax Court. § 6330(c)(2)(B).

CONCLUSION

For the reasons stated above, this Court should grant the petition for rehearing and hold that the filing deadline in § 6213(a) is not jurisdictional and is subject to equitable tolling.

Respectfully submitted,

s/ T. Keith Fogg
Professor T. Keith Fogg
Counsel for Amicus
Director, Federal Tax Clinic of the
Legal Services Center of
Harvard Law School
122 Boylston Street
Jamaica Plain, Massachusetts 02130
(617) 390-2532
kfogg@law.harvard.edu

s/Carlton M. Smith
Carlton M. Smith, Esq.
Counsel for Amicus
255 W. 23rd Street, Apt. 4AW
New York, New York 10011
(646) 230-1776
carltonsmth@aol.com

Dated: August 7, 2020

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 and Fed. R. App. P. 29(a)(5) (for amicus briefs). The brief is 4,170 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Amicus

Dated: August 7, 2020

CERTIFICATE OF SERVICE

This is to certify that a copy of this amicus brief was served on counsel for the appellant, Douglas L. Youmans, Esq., by filing it with the CM/ECF system on August 7, 2020, of which he is a member. This is to certify that a copy of this amicus brief was served on counsel for the appellee, Paul A. Allulis and Francesca Ugolini, Esqs., by filing it with the CM/ECF system on August 7, 2020, of which they are both members. All counsel in the case are members of the CM/ECF system.

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Amicus

Dated: August 7, 2020